

**IN THE HIGH COURT OF NEW ZEALAND  
ROTORUA REGISTRY**

**I TE KŌTI MATUA O AOTEAROA  
TE ROTORUA-NUI-A-KAHUMATAMOMOE ROHE**

**CIV-2018-463-000027  
[2019] NZHC 1554**

BETWEEN	THE COMMISSIONER OF POLICE Applicant
AND	FRANK AMADEUS MILOSEVIC First Respondent
	IRENE RAKI Second Respondent

Hearing: 29 and 30 April 2019

Appearances: R Jenson for the Applicant  
M Harborow for the Official Assignee  
W Nabney for First Respondent Frank Milosevic  
N Bradley for Second Respondent Irene Raki

Judgment: 3 July 2019

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**JUDGMENT OF HINTON J**

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*This judgment was delivered by me on 3 July 2019 at 4.00 pm  
pursuant to Rule 11.5 of the High Court Rules*

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*Registrar/Deputy Registrar*

*Counsel/Solicitors:*  
William Nabney, Barrister, Tauranga  
Pollett Legal Ltd, Tauranga  
Meredith Connell, Auckland  
Robinson Law Ltd, Whakatane

[1] By application dated 25 May 2018, the Commissioner seeks orders under ss 34 and 35 of the Criminal Proceeds (Recovery) Act 2009 (the Act) for the sale of a number of assets which are the subject of on-notice restraining orders made by Lang J on 30 July 2018 (and prior to that, without notice orders dated 23 March 2018).

[2] The assets for which a sale order is sought are:

- (a) A 2012 Ford Falcon F150 Raptor utility (“the Ford Raptor”).
- (b) A kitset AC Cobra convertible car (“the Cobra”).
- (c) A 2013 Harley Davidson motorcycle (“the Harley”).
- (d) A 2012 Toyota Hiace van (“the Hiace”).
- (e) A 2005 Toyota Hilux utility (“the Hilux”).
- (f) A Kawasaki Ultra 300LX jet ski and trailer (“the jetski”).
- (g) An Eliminator Hydroplane powerboat and 2007 boat trailer.
- (h) A 6.5m aluminium fishing boat with a Yamaha outboard motor and trailer.

[3] The property was seized following an investigation called Operation Notus into criminal activity, predominantly supply of methamphetamine and cannabis on the part of members of the Kawerau Mongrel Mob. The first respondent has been charged with drug-related offences, including dealing methamphetamine. His partner, the second respondent, has been charged with money laundering.

[4] The application for sale is opposed by both respondents.

[5] Both respondents have pleaded not guilty. A date for the criminal trial has not been set yet and is unlikely to be until mid-to-late next year. The forfeiture proceedings may not be disposed of until late 2020/mid-2021.

## **Joint hearing with Commissioner v Parker and others – CIV-2018-463-000029**

[6] By agreement between the parties and order of Gordon J, this case was heard together with *Commissioner of Police v Parker & Others* because of commonality of issues and evidence, particularly with regard to matters concerning the Official Assignee.<sup>1</sup>

[7] The common evidence and common issues are addressed in the *Parker* judgment, a copy of which is attached to this judgment.

### **Overview of this case**

[8] As is usual with an application for sale, the Commissioner relies on delay in resolution of the forfeiture proceeding. Mr Nabney, for the first respondent, says the delay arises at least in part from the Commissioner not having filed that proceeding. However, delayed filing is common, and necessary, in matters such as this, as a result of the ongoing investigation. Realistically the forfeiture proceeding will not be resolved until after the criminal trial, in any event. I do not consider any delay is the fault of the Commissioner.

[9] Otherwise, as a consequence of my review of the law and findings in *Parker*, which are equally applicable and I rely on here, I can turn immediately to address each asset.

### **The Ford Raptor**

#### *Value and depreciation*

[10] The Official Assignee obtained an e-valuation for the Raptor as at about May 2018 of \$32,000. Indicative depreciation based on the IRD schedules is 21% per annum on a straight line basis. Storage costs are \$13.50 per day, or about \$4,900 per annum. The compounding storage costs are settled at the time of sale of the asset, if it is forfeited.

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<sup>1</sup> *Commissioner of Police v Parker* [2019] NZHC 1506.

[11] Although not raised in the notice of opposition, the first defendant submits that the actual value of the Raptor is not the figure of \$32,000 placed upon it by the Commissioner, but rather is higher than that, relying on an affidavit filed by the Commissioner from James Craw who deposes to having sold the Raptor to Mr Milosevic for \$90,000 in February 2016. That is several years before the e-valuation.

[12] The Official Assignee, Mr Sayers, accepts that the Raptor “may” sell for a lot more than \$32,000, but nevertheless the only evidence I have as to indicative value at mid-2018 is \$32,000. I accept that \$32,000 is likely to be a very minimum value. However, the exact value is not so material to this application, other than on an indicative basis to determine depreciation and to assess the proportion of depreciation and storage costs to value.

[13] I add that the Official Assignee accepts that e-valuations tend to be a minimum and says that he goes to every length possible to achieve the best price on a sale. So if the value is higher than \$32,000 and I order a sale, the e-valuation should not prejudice the respondents.

[14] With regard to each asset referred to in this judgment, I recognise that the IRD rate most likely exceeds the depreciation that might apply, for the reasons set out in *Parker*.<sup>2</sup>

[15] Mr Nabney raises the point that the 2012 Raptor, if straight line depreciation of 21% is in any way correct, by 2017/2018 would have nil value, yet the 2018 e-valuation is \$32,000. That is fair comment, but it does not detract from the fact that the vehicle will be depreciating. The Commissioner’s position is clear that both the e-valuation and the IRD depreciation rates are indicative only. The first is accepted as likely to be too low, and the second as likely to be too high. The aim is to provide the Court with some assistance in terms of general depreciation of value of chattels, which as Venning J said, is accepted as a matter of common sense anyway.<sup>3</sup>

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<sup>2</sup> At [40]-[41].

<sup>3</sup> *Commissioner of Police v Cavanagh* [2014] NZHC 2978 at [9].

[16] The evidence from the Official Assignee is that the storage/holding costs are carefully calculated and closely watched. They are not based on costs for the individual item, but rather the average costs incurred for a motor vehicle, motorbike, boat and so on. There is no profit element in the Official Assignee's calculations.

*Storage at respondents' residence*

[17] The first respondent says that the Raptor should not be sold as it is not a common vehicle, and storage costs could be saved by returning it to him for storage.

[18] There is no application for the Raptor to be stored away from the Official Assignee's secured storage unit, nor any application to remove the Raptor from restraint. There is therefore no need to consider that matter further, for the reasons set out in my attached judgment in *Parker*.<sup>4</sup>

[19] In addition, I accept the evidence of the Official Assignee that the uncertain and varying proposals made as to storage at the respondents' home address at Domett Avenue, Kawerau, would in no way involve the Raptor still being under the Official Assignee's custody and control. Storage at Domett Avenue would also not be viable for numerous reasons, including the garage being too small to house it, and significant security concerns.

[20] As with *Parker*, there is also no proof that any costs would be saved. To the contrary, the Official Assignee's evidence, which I accept, is that storage at the respondents' home would likely result in additional costs over and above those that would otherwise be incurred by the Official Assignee at the secure storage unit. Mr Nabney suggested that there would be economies of scale because Domett Avenue itself is under restraint and so the property and Raptor could be checked at the same time. However, Mr Sayers explained that different personnel are required and restrained vehicles are maintained more regularly than properties are inspected. There would also be security risks for staff and contractors visiting the property.<sup>5</sup>

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<sup>4</sup> *Commissioner of Police v Parker* [2019] NZHC 1506 at [59]-[62].

<sup>5</sup> At [69].

[21] The evidence is also that the likely depreciation in the Raptor will be greater if stored with the first respondent than if it were stored securely with the Official Assignee, given the extensive measures taken by the Official Assignee to care for property and preserve value during the period of the restraint, to which I have already referred at length in *Parker*.

#### *Raptor not a common vehicle*

[22] As noted above, the first respondent also says the vehicle is not common and would be difficult to replace. However, the evidence is that there were six or seven Ford Raptors listed on Trade Me on the day of hearing, so that point gains no traction. The fact there was only one 2012 Raptor does not detract from that.

#### *Conclusion*

[23] Weighing all of these matters, I consider it is appropriate to order a sale of the Raptor, given the potential depreciation and storage costs and length of time until the forfeiture proceeding is resolved. There are no special factors relating to it and storage with the respondents is not an option.

#### **The AC Cobra**

[24] The Commissioner filed an affidavit by Colin Welch, who had worked on the Cobra. His expertise was not disputed. His affidavit dated September 2018 records that it is not an original Cobra; it is a poor copy and it has a value of between \$12,000 and \$15,000.

[25] The IRD depreciation rate, and the Official Assignee's storage/holding costs are at the same rates as for the Raptor.

[26] Mr Welch materially backtracked on his affidavit evidence during cross-examination from Mr Nabney, for the first respondent. He said that he had erred in his appraisal of value. Rather extraordinarily, he reassessed the Cobra as having a value of about \$45,000. He said further that it was unlikely to depreciate. It would either hold value, or appreciate in value.

[27] In light of the material change in Mr Welch's evidence, Mr Jenson acknowledged that the Commissioner had to rely in regard to this vehicle solely on storage or holding costs. I note even then Mr Sayers acknowledged that the storage/holding costs may be less than the standard amount because as I understand it, the Cobra is not functioning. There would still be mechanical issues, but the maintenance costs would be less than usual.

[28] Further, the first respondent gave evidence of his longstanding interest in owning a Cobra and the fact that he acquired the body in 2012. I am also persuaded that the Cobra, while not unique, is relatively rare.

[29] I have to conclude that the AC Cobra will likely not decrease in value, and may even increase in value. Given the first respondent's evidence as to the significance of the Cobra for him and given that the vehicle is uncommon, I do not consider that the storage costs alone would justify a sale.

[30] I therefore decline the application for sale of the Cobra.

### **The Harley Davidson**

[31] The Harley has an indicative value of \$20,000. The IRD schedule depreciation cost is 21% per annum on a straight line basis. The storage/holding cost is \$5.80 per day or about \$2,100 per annum.

[32] The first respondent opposes the sale of the Harley Davidson on the basis that it is held by him as a bare trustee and belongs to the collective membership of the Kawerau Mongrel Mob. It is claimed to be a memorial to Tahu Kingi, a longstanding Mongrel Mob member who died last year. The first respondent says it therefore ought not to be sold.

[33] Up to the time of seizure, nothing had been done to physically memorialise or change the vehicle since it was purchased other than to add the Mongrel Mob logo on the top of the fuel tank. Mr Conroy, the first respondent's best friend, said they were going to add a photo of Mr Kingi "at some stage".

[34] I also note that although it is claimed Mr Milosevic holds the Harley in trust, there is no objective evidence in support. Mr Milosevic and his younger son appear to be the only people who have been seen riding the bike. There is no documentary evidence to support the claim of alternative ownership. The fact that it has a gang logo sticker on it is not surprising when it is alleged that Mr Milosevic is the President of the Kawerau chapter. I note that there is no application on behalf of the Mongrel Mob asserting their interest.

[35] Such evidence as I do have regarding the claimed Mongrel Mob ownership, I found unconvincing. For example, the evidence from Mr Conroy really added nothing. As he himself said, he lives and works six days a week in Te Puke and goes to Kawerau for the occasional meeting but he was not in attendance at meetings relevant to the acquisition of the Harley. His evidence seemed to be entirely hearsay. As Mr Jenson pointed out, Mr Te Rito's affidavit was word-for-word the same as Mr Conroy's.

[36] I also do not consider there is any particular sentimental value or other special value attached to this vehicle on account of its alleged memorial status, in particular because it has not been personalised, or "memorialised".

[37] If it is correct that the Harley belongs to the Kawerau Mongrel Mob, they will in fact be better off if it is sold, rather than it depreciating pending resolution. The proceeds will then earn interest and a substitute "memorial" Harley can be purchased in the event their claim prevails.

[38] I am satisfied that the combination of the potential depreciation and storage costs in the case of a vehicle worth about \$20,000, and the likely period of time down to disposal of the forfeiture application, justifies an order for sale.

### **The Toyota Hiace van**

[39] The Hiace has an indicative value of \$30,000. The same depreciation rate and storage costs apply as for the other motor vehicles, namely 21% per annum on a straight line basis and storage/holding costs of \$4,900 per annum.



[40] In this case, the respondents claim that the vehicle is held by the second respondent as a bare trustee. They say it is actually owned by the Putauaki Stags Rugby League Club, of which it seems their grandchildren or other relatives were members.

[41] The evidence is that the second respondent bought the vehicle in cash. The vendor swore an affidavit to that effect. I accept that there is evidence of use by the Rugby League Club, supported by two photos. In addition, the van had the club insignia on the side and the vendor said Ms Raki told him it was for a sports club. It seems fairly clear that the Club was intended to use it, and did use it. I understand that Ms Nuku, the Club's secretary, swore an affidavit dated 18 July 2018 saying that the Club has an interest in the vehicle.<sup>6</sup> However, she did not attend Court following notice that she was required for cross-examination. Her affidavit evidence has to be put to one side. There is no independent evidence therefore on behalf of the Club regarding any ownership claim, as opposed to use.

[42] I have some sympathy for the Club (at least in terms of their not being able to use the vehicle) but the Toyota Hiace is subject to the restraining order and the Club has made no application in respect of it. Further, regardless of who is the true owner, it will clearly depreciate in the meantime. There is no particular sentimental or non-monetary value attached to it. If the van is sold, the Club could still file an application and, if successful, would ultimately receive greater funds than if unsold. The proceeds remain "restrained property" in terms of s 36(4) of the Act.

[43] I am satisfied that, given the value of the vehicle, the quantum of likely depreciation and storage costs, and the other matters discussed above, it is appropriate to order a sale.

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<sup>6</sup> I was advised of this affidavit, but have not been able to locate it on the Court file. There is a second affidavit filed by Ms Nuku, dated 9 August 2018 in which she refers to the first. The second affidavit annexes the photos which in the end were produced by Ms Raki. It does not matter that the July 2018 affidavit is missing as whatever its contents, it is not part of the evidence.

## **The Toyota Hilux**

[44] This vehicle has an estimated value of \$9,000 and the same potential depreciation rate and storage costs as for the other motor vehicles. It is registered in the name of the second respondent.

[45] The second respondent opposes sale on the basis the Hilux has effectively bottomed-out in value and is unlikely to depreciate further. She also opposes sale because she says it is the only vehicle she had and she intends to apply under s 51 of the Act for it to be excluded from forfeiture on the basis of undue hardship. She does not claim that the vehicle has any special or individual status.

[46] I agree that the vehicle has a low value and correspondingly low depreciation. It no doubt is nearing the end of its depreciable life. However, I also agree with Mr Jenson that where an asset has such low value, the storage costs move into sharper focus.

[47] I note Ms Raki's claim that the Hilux was, until it was restrained in May 2018, the only vehicle she had. But there is no claim before the Court for release on the grounds of hardship. She also accepted that at the time she swore her affidavit, she in fact had the use of a blue Mini which it seems she continued to use for some time. She says the Mini belonged to Nelson Milosevic (who I believe is her brother-in-law), and he sold it in January this year, on a brief trip back to the country. In the meantime, she knew the Commissioner had become aware that she was driving the Mini. I found Ms Raki's evidence overall to be implausible, to say the least.

[48] I consider the Hilux should be sold. For a vehicle with such low value, the storage costs alone will likely eat up any equity in the event forfeiture is ordered and there are no good reasons for keeping it. I rely in this regard on s 34 of the Act and refer to my reasoning in *Parker*.<sup>7</sup>

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<sup>7</sup> *Commissioner of Police v Parker* [2019] NZHC 1056 at [51]-[55].

### **Kawasaki ultra jetski and trailer**

[49] The jetski and trailer have been assessed as having a value of \$7,000. The IRD straight line depreciation rate is 30% and storage costs are \$4,900 per annum.

[50] The particular opposition to sale is based on a claim that the jetski and trailer were gifted to and really owned by the respondents' daughter. However, the daughter's evidence did not support that claim. Her evidence suggests that the jetski is owned by her father, or by the family, and that her father just came home with it at some point.

[51] In any event, I am not deciding who is the owner, but rather whether the jetski should be sold, in which case the argument becomes one over proceeds of sale. There is nothing special about the jetski that would mean it should be preserved on account of the ownership claim.

[52] Although the asset is of relatively low value, I consider it is the sort of asset that will depreciate. Given those factors, the storage costs, and lack of any special value, I agree with Mr Jenson it is appropriate that the jetski and trailer should be sold.

### **The Eliminator powerboat and associated trailer**

[53] The Eliminator powerboat has an estimated value of \$16,000. The IRD depreciation rate is 8.5% per annum on a straight line basis, and storage costs are \$17.80 per day, or \$6,500 per annum.

[54] I note the points made by Lang J in *Commissioner of Police v Drummond* with regard to a boat, where he questioned whether there would truly be depreciation in the case of a boat that was not being used.<sup>8</sup> While I agree that a boat would depreciate less than a car in circumstances where it is sitting in storage, I see no reason nonetheless why there would not be some depreciation through age, especially with a boat of this nature.

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<sup>8</sup> *Commissioner of Police v Drummond* [2018] NZHC 1730 at [6].

[55] The real point in the case of the powerboat is the significance of high storage costs, which I have already held in *Parker* can be taken into account.<sup>9</sup> Mr Sayers accepted that ongoing maintenance costs would be minimal, but that clearly applied to all boats, so I do not see that evidence affecting the Official Assignee's calculation of the average storage/holding cost per day for a boat. That average cost would take account of the fact that ongoing maintenance costs would be minimal for boats in general. The bulk of the storage/holding costs I expect relates to storage of what will be a sizeable asset that has to be kept inside.

[56] Mr Milosevic says that the powerboat is unusual because it is a high-performance version. He claims it would not be easily replaced if it were sold, but accepts it is not rare.

[57] This is not a high-value boat, even allowing for \$16,500 being a minimum. The storage costs coupled with some depreciation are such that I consider it appropriate to order a sale. The fact that it is unusual does not dissuade me from that view. There was no evidence to show it could not be replaced – just the assertion that it would not be easy.

### **The 6.5m Fishing Boat with Yamaha outboard motor**

[58] This boat has been assessed at \$2,500. Theoretically straight line depreciation runs at 8.5% per annum. The storage costs are \$17.80 per day or \$6,500 per annum.

[59] The first respondent says the boat and trailer have significant emotional value to himself and his family because they were originally his father's. They had been owned by other members of the family for some time, but then came to him through a swap. Also, he says the age of the vessel is such that it has likely bottomed-out in terms of depreciation.

[60] I agree the fishing boat is of very low value and therefore depreciation is of little, if any moment. However, again, there is a high level of storage costs. While I am not unsympathetic to the first respondent's claim of sentimental value, the very

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<sup>9</sup> *Commissioner of Police v Parker* [2019] NZHC 1506 at [52].

high proportionate storage costs, in my view, leave no option but that the boat should be sold.

[61] I did raise with the Commissioner whether consideration is given to not restraining an item of such low value and was advised that such consideration is and was given, but the Commissioner decided nonetheless to restrain it. I am not in a position to second-guess that. Also, I can appreciate that there were a large number of items being seized here and so it would have been somewhat difficult to distinguish between them.

[62] I consider an order for sale of the fishing boat to be appropriate.

[63] I would add that I can see nothing to prevent the first respondent “purchasing” the boat given the low amount involved. Even though the first respondent has had extensive assets seized, I expect he can lay his hands on \$2,500. The sum paid will still be subject to restraint and the first respondent’s “emotional value” concerns about the boat would be addressed with relatively low outlay. If the first respondent prevails on the forfeiture application, he will get his money back.

## **Conclusion**

[64] Other than with regard to the AC Cobra, where an order for sale is declined, I make orders in accordance with the Commissioner’s application for sale dated 25 May 2018. To be clear, those orders are made under s 34 of the Act.

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Hinton J